

# LEGAL REVIEW OF THE INHERITANCE RIGHTS OF ILLEGAL CHILDREN FROM THE PERSPECTIVE OF THE COMPILATION OF ISLAMIC LAW (KHI) FOLLOWING THE CONSTITUTIONAL COURT DECISION NUMBER 46/PUU-VIII/2010

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## Abstract

This study aims to (1) determine the relevance of conducting a judicial review of Constitutional Court Decision Number 46/PUU-VIII/2010, reviewed based on applicable laws and regulations, and (2) determine the legal consequences of the inheritance rights of illegitimate children for the parties following Constitutional Court Decision Number 46/PUU-VIII/2010. The type of research used is normative legal research. The approaches used in this study are the statutory approach, the case approach, and the conceptual approach. The legal sources used are primary legal materials, secondary legal materials, and tertiary legal materials that have been obtained and then analyzed to obtain conclusions relevant to this research problem. The results of this study indicate that (1) the relevance of conducting a judicial review of Constitutional Court Decision Number 46/PUU-VIII/2010 is due to the provisions in Article 43 paragraph (1) of Law No. 1 of 1974 only regulates that children born outside of marriage only have a civil relationship with their mother and their mother's family, which is contrary to constitutional rights as citizens in Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution and (2) the legal consequences of the inheritance rights of children born outside of marriage after Constitutional Court Decision Number 46/PUU-VIII/2010 are that the recognition of children born outside of marriage as legitimate children means that they will have an inheritance relationship with their biological father without having to be preceded by recognition and validation, on the condition that a biological relationship between the child and the biological father can be proven based on science, for example through a DNA test.

Keywords : Children, inheritance rights, out of wedlock

## Introduction

The Unitary State of the Republic of Indonesia provides protection for its citizens who enter into marriage by issuing Law Number 1 of 1974 concerning Marriage (hereinafter referred to as Law No. 1 of 1974). The enactment of Law No. 1 of 1974 serves as the legal basis for marital relations in Indonesia.

Marriage is a crucial institution in society. Its existence legalizes the legal relationship between a man and a woman. According to Article 1 of Law No. 1 of 1974, marriage is a physical and spiritual

bond between a man and a woman as husband and wife with the aim of forming a happy and eternal family (household) based on the One Almighty God.

The legal consequences of a marriage include the creation of a legal relationship between husband and wife, a legal relationship between parents and children, the formation of marital property, the status and status of children, and inheritance. These legal consequences can only arise if the marriage is legally conducted and registered according to applicable laws and regulations.

The validity of a marriage according to Law No. 1 of 1974, namely if it fulfills Article 2 paragraphs (1) and (2), it is valid if the marriage is conducted according to the laws of each religion and belief and each marriage is registered according to applicable laws and regulations. So even if the marriage is valid according to each religion, the marriage is certainly not valid under Law No. 1 of 1974. This is because the marriage was not registered according to applicable laws and regulations.

According to the provisions of Article 80 of the Civil Code, it states that a marriage must be conducted before an employee of the Civil Registry Office. Continued with Article 81 of the Civil Code, a religious marriage may be conducted after the marriage has taken place before an employee of the Civil Registry Office. These two articles mean confirming that if a marriage is only conducted according to religion and not before an employee of the Civil Registry Office, the legal consequences of the application of Article 80 in conjunction with Article 81 of the Civil Code above, namely the relationship between husband and wife, the relationship between parents and their children does not give rise to civil relations. The civil relationship referred to here is the inheritance relationship between husband and wife or parent and child, the status of children born, and the guardianship relationship.

According to Indonesian national marriage law, children are divided into two categories: legitimate children and illegitimate children. As defined in Article 42 of Law No. 1 of 1974, a legitimate child is a child born within or as a result of a legal marriage, while an illegitimate child is a child born outside of a legal marriage. Therefore, a child born in an unregistered marriage is considered illegitimate.

According to Article 43 paragraph (1) of Law No. 1 of 1974, a child born outside of marriage

has a civil relationship only with the mother and the mother's family. Therefore, an illegitimate child does not have a civil relationship with the father and the father's family, which is also in accordance with Article 100 of the Compilation of Islamic Law (KHI).

Considering the problems that arise in society regarding illegitimate children, it is clear that illegitimate children do not have a civil relationship with their father and their father's family. This results in illegitimate children being denied a living, educational, or inheritance guarantee. Furthermore, illegitimate children are viewed negatively within society, unlike legitimate children.

Constitutional Court Decision No. 46/PUU-VII/2010 only states that illegitimate children have a civil relationship with their father and their father's family, if proven by science and/or other technology. Therefore, this decision does not clearly explain the specific provisions or rules regarding the distribution of inheritance for illegitimate children.

The public has not fully accepted Constitutional Court Decision No. 46/PUU-VIII/2010, as some believe that the decision legalizes children involved in adultery. The phenomena that have emerged in society since Constitutional Court Decision No. 46/PUU-VIII/2010 have been diverse. Some people feel they have benefited from Constitutional Court Decision No. 46/PUU-VIII/2010, while others feel that it is inconsistent with Islamic law.

This difference of opinion regarding the inheritance rights of illegitimate children determines whether an illegitimate child can request and receive these rights from their biological father. From the explanation above, there are two conflicting legal regulations regarding the inheritance rights of illegitimate children (a conflict of norms): the rule contained in the Compilation of Islamic Law (KHI) that children born out of wedlock have only a blood relationship with their mother and her mother's family and are not entitled to inheritance. The Constitutional Court Decision No. 46/PUU-VIII/2010 explains that an illegitimate child also has a civil relationship with his father if it can be proven by science and/or other technology.

## Methods

This thesis utilizes normative legal research, meaning that in discussing the problem at hand, the researcher will examine relevant legal principles and regulations. Normative legal research includes research on legal principles, legal systematics, legal synchronization, legal history, and comparative law.

## Results and Discussion

**The relevance of a judicial review of Constitutional Court Decision No. 46/PUU-VIII/2010 is examined based on applicable Indonesian laws and regulations**

The relevance of a judicial review of Constitutional Court Decision No. 46/PUU-VIII/2010 concerns the civil relations of children born out of wedlock. This civil relationship concerns inheritance. Therefore, this researcher will discuss the inheritance rights of illegitimate children.

On February 17, 2012, the Constitutional Court made a revolutionary legal breakthrough regarding the granting of civil relations to illegitimate children. Constitutional Court Decision No. 46/PUU-VIII/2010 represents a legal breakthrough in family law. Previously, illegitimate children only had a civil relationship with their mother and their mother's family, but following Constitutional Court Decision No. 46/PUU-VIII/2010, they now have a civil relationship with their biological father, provided they are proven to be related by blood. The implication of the meaning of civil relations is a reciprocal relationship in the form of rights and obligations between a mother and her child, between a father and his child, and between a child and both parents. The meaning of civil relations here is the right to education, protection, and also includes inheritance rights. Therefore, the Constitutional Court Decision Number 46/PUU-VIII/2010 is binding and serves as jurisprudence for subsequent similar cases regarding the inheritance rights of illegitimate children.

According to the Civil Code (KUHPperdata), for an illegitimate child to have a relationship with their father and mother, according to Article 280 of the Civil Code, the father and mother must acknowledge the child. Failure to acknowledge the child can result in the child being fatherless and motherless.

Meanwhile, according to Article 43 paragraph (1) of Law No. 1 of 1974, a child born out of wedlock has a civil relationship only with the mother and her mother's family. However, following Constitutional Court Decision No. 46/PUU-VIII/2010, the child is entitled to civil rights from the father and his family, provided they can be proven through knowledge or technology such as DNA testing.

On the other hand, under Islamic law, a child born out of wedlock has a relationship only with the mother. As stipulated in Article 100 of the Compilation of Islamic Law (KHI), a child born out of wedlock has only a blood relationship with the mother. Therefore, the Indonesian Ulema Council (MUI) firmly believes that, according to sharia, a child born out of wedlock is considered a child of adultery.

Children of adultery are not entitled to lineage, inheritance, or marriage guardianship from their biological father or their father's family. The Indonesian Ulema Council (MUI) even urged the Constitutional Court to overturn its ruling. According to Sheikh Sayyid Sabiq's Fiqh Sunnah, Volume 4, a child of adultery is a child born outside of a legal marriage and has no inheritance relationship with his father due to the lack of legitimate lineage. He only has an inheritance relationship with his mother, as stipulated in Article 186 of the Compilation of Islamic Law.

The Constitutional Court's ruling regarding the civil rights of illegitimate children represents a revolutionary *ijtihad*, as the concept of Islamic Fiqh and legal practice in Religious Courts has previously held that illegitimate children do not have mutual inheritance rights with their father due to the lack of legitimate lineage. In response to Constitutional Court ruling No. 46/PUU-VIII/2010, the Indonesian Ulema Council (MUI) responded by issuing fatwa No. 11 of 2012 concerning the Status and Treatment of Children of Adultery. This ruling has raised questions from the public regarding the status of children born of adultery, particularly regarding the relationship between the child's lineage, inheritance, and guardianship of the child born of adultery and the man who caused their birth. Therefore, it is deemed necessary to issue a fatwa on the status of children born of adultery, in accordance with Article 100 of the Compilation of Islamic Law (KHI), which states that children born out of wedlock have a lineage relationship only with their mother and her mother's family. The Quran

clearly and firmly states that the inheritance relationship between a child born of adultery and the man who caused their birth cannot be mutually inherited. This also aligns with Article 186 of the Compilation of Islamic Law, which states that children born out of wedlock have a mutual inheritance relationship only with their mother and her mother's family. Therefore, within the framework of Islamic law, it is very difficult to define the status of an illegitimate child if it is to be aligned with Constitutional Court Decision No. 46/PUU-VIII/2010.

Constitutional Court Decision No. 46/PUU-VIII/2010 has drawn both pros and cons, with some agreeing and others disagreeing. The National Commission on Violence Against Women (Komnas Perempuan) welcomed the Constitutional Court Decision No. 46/PUU-VIII/2010, citing its compliance with the Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women (Law No. 7 of 1984). Komnas HAM commissioner Saharuddin Daming wrote an article praising the Constitutional Court's decision as a "spectacular breakthrough." According to Daming, the provisions of Article 2 paragraph (2) and Article 43 paragraph (1) of Law No. 1 of 1974 concerning Marriage violate the sense of justice and contradict the principles of human rights guaranteed by Article 28B paragraphs (1) and (2) and Article 28D paragraph (1). The Indonesian Ulema Council (MUI) opposed the Constitutional Court's decision. According to Prof. Dr. H. Rachmat Syafe'i, Lc., M.A., Head of the West Java MUI Fatwa Division, the decision has caused unrest among Muslims, as it indirectly violates Islamic teachings. A decision that validates the relationship between lineage, inheritance, guardianship and maintenance between a child resulting from adultery and the man who gave birth to it is not justified in Islamic teachings. In fact, Islamic inheritance law, which is based on the Qur'an and Sunnah, clearly and firmly states which categories receive inheritance.

So the relevance of judicial review with Constitutional Court Decision Number 46/PUU-VIII/2010 is the issue of civil relations of illegitimate children contained in Article 43 paragraph (1) of Law No. 1 of 1974. At that time, artist Machica Mochtar submitted an application to the Constitutional Court so that her child's civil rights could also be with her father and his father's family. The provisions in Article 43 paragraph (1) of Law No. 1 of 1974 only regulate that illegitimate children only have a civil relationship with their mother and their mother's family, which is contrary to

constitutional rights as citizens in Article 28B paragraph (1) and paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution so that the applicant filed a judicial review. And after the Constitutional Court Decision Number 46/PUU-VIII/2010, illegitimate children have a civil relationship with their father and their father's family as long as it can be proven by science or other technology. The researcher's analysis of the inheritance rights of illegitimate children in the resulting issues is that illegitimate children retain the right to inherit property, as stipulated in Constitutional Court Decision Number 46/PUU-VIII/2010. Based on the considerations explained above, illegitimate children are entitled to protection and legal certainty, as stipulated in Article 28B paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution. Furthermore, the status of children is also regulated in Law Number 35 of 2014, which stipulates that every child has the right to have their rights protected without discrimination. This ensures that there is no distinction between legitimate and illegitimate children in terms of social, economic, educational, inheritance, or other rights. Both are legal subjects whose rights must be protected by the state. Therefore, the researcher agrees with Constitutional Court Decision Number 46/PUU-VIII/2010. According to researchers, Constitutional Court Decision Number 46/PUU-VIII/2010 has provided positive legal developments regarding the civil rights of illegitimate children when viewed from a Human Rights perspective. The authors agree that illegitimate children have the right to receive legal protection. This includes knowing who their parents are in accordance with Article 7 paragraph (1) of Law No. 23 of 2012 concerning Child Protection, which states that "every child has the right to know their parents, be raised, and be cared for by both parents."

### **The legal consequences of the inheritance rights of illegitimate children for the parties following Constitutional Court Decision Number 46/PUU-VIII/2010**

Legal consequences are the consequences resulting from a legal event. Because a legal event is caused by a legal act, and a legal act can also give rise to a legal relationship, legal consequences can also be interpreted as the consequences of a legal act and/or legal relationship (e- kampushukum.com). In this study, the legal consequences of the inheritance rights of illegitimate children following Constitutional Court Decision Number 46/PUU/VIII/2010 include the following:

1. Once a child has a civil relationship with their biological father, the child has reciprocal rights and obligations with their parents. The rights and obligations of parents are regulated in Chapter X, Articles 45-49 of Law No. 1 of 1974, including the parental obligation to care for and educate the child, the parental obligation to represent the child in all matters if the child is a minor, and the parental obligation to provide protection and manage the child's assets. A biological father can no longer shirk his legal obligation to care for and educate the child on the grounds of the absence of a valid marriage bond with the mother. A father must provide for the child's living and educational needs, even if he is not legally married to the mother, or even if the father is married to another person. Eliminating discriminatory treatment of illegitimate children will undoubtedly have a positive impact on the child's future. The obligation of alimony, previously borne solely by the mother, is now replaced by a male father who can be proven to be related to the child through a DNA test. If the father neglects his obligations to the child, the legal consequences can be challenged in court. Therefore, with this ruling, children have a more secure future and receive legal protection.

2 With this ruling, illegitimate children receive civil rights from their father and their father's family, provided they can be proven through legal science and technology, such as a DNA test. One of the civil rights referred to here is the right to inherit property from their father (the heir). Therefore, this research will focus on discussing the legal consequences of illegitimate children's inheritance rights. Despite the controversy, Constitutional Court Decision No. 46/PUU-VIII/2010 aligns with the concept of justice outlined in Murtadlo Muthahhari's book, which states that justice is about upholding individual rights and granting rights to everyone who deserves them.

This Constitutional Court Decision allows illegitimate children to obtain civil rights from their biological fathers, such as maintenance, inheritance rights, and guardianship. Constitutional Court Decision No. 46/PUU-VIII/2010 does not specify the inheritance rights of illegitimate children, but only addresses their civil relationship. The recognition of illegitimate children following Constitutional Court Decision No. 46/PUU-VIII/2010 means they will have an inheritance relationship with their biological father, further strengthening the position of illegitimate children in inheritance matters.



According to the Civil Code, an illegitimate child can establish a civil relationship with their biological father by recognizing the child as such, as stipulated in Article 280 and Article 281 of the Civil Code. This recognition establishes a civil relationship between the child and its father or mother. Acknowledgment of an illegitimate child can be achieved through a birth certificate. The relationship between mother and child is established automatically through birth, while the relationship between father and child is only established through recognition.

Constitutional Court Decision No. 46/PUU-VIII/2010 strengthens the position of the mother of an illegitimate child in seeking recognition of her biological father. If the father refuses to acknowledge the illegitimate child, he can be sued in court. With the biological father's recognition of the illegitimate child, inheritance rights arise. Therefore, the illegitimate child is entitled to inherit property from their biological father. The inheritance of illegitimate children who are recognized is stipulated in Article 862 of the Civil Code, which states that if the deceased leaves behind illegitimate children who have been legally recognized by law, their inheritance is divided according to the method determined by applicable law. The legal concept of inheritance for illegitimate children under Civil Law is that for an illegitimate child to inherit, it must be accompanied by legal recognition from both parents through a birth certificate. Article 863 states that if the deceased leaves legitimate descendants or a wife, the illegitimate child inherits 1/3 (one-third) and the portion they were originally entitled to receive.

However, illegitimate children differ from legitimate children. Legitimate children are clearly born of a valid marriage and are entitled to an inheritance according to Category I of the Civil Code, referred to as heirs. Meanwhile, illegitimate children are born of an invalid marriage and are entitled to an inheritance, referred to as inheritors. Therefore, legitimate children are absolutely and fully considered class I heirs, while illegitimate children are considered heirs because they are entitled to inheritance according to Constitutional Court Decision Number 46/PUU-VIII/2010.

Constitutional Court Decision Number 46/PUU-VIII/2010 clarifies the legal status of illegitimate children in obtaining legal certainty regarding their inheritance rights. This Constitutional Court Decision can be used as a legal basis for issues related to the inheritance rights of illegitimate children. Furthermore, regarding Islamic law, the Supreme Court has made a legal breakthrough in establishing

the rights of illegitimate children to receive maintenance and the distribution of inheritance assets left by their biological father through a mandatory will. This provision is stated to have been included in Supreme Court Circular Letter (SEMA) Number 7 of 2012, a result of discussions by the Commission for Religious Courts. This legal breakthrough is a legal consequence of Constitutional Court Decision Number 46/PUU-VIII/2010, in the material review of Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage. From an Islamic legal perspective, a *wajibah* will is a will intended for heirs or relatives who do not receive a share of the deceased's inheritance due to certain obstacles. For example, in the Compilation of Islamic Law, Article 100 explains that illegitimate children are only related by blood to their mother and her mother's family. Therefore, illegitimate children are prevented from inheriting from their biological father. However, with the issuance of a Circular Letter from the Supreme Court, illegitimate children, according to Islamic law, can inherit through a *wajibah* will.

## Conclusion

Based on the explanation above, the following conclusions can be drawn by the researcher:

1. The relevance of conducting a judicial review of the Constitutional Court Decision Number 46/PUU-VIII/2010 because the civil rights of illegitimate children in Article 43 paragraph (1) are contrary to the constitutional rights regulated in the 1945 Constitution, namely: Article 28B paragraph (1) which states, "Everyone has the right to form a family and continue their lineage through a legal marriage", Article 28B paragraph (2) which states, "Every child has the right to survival, growth, and development and has the right to protection from violence and discrimination", and Article 28D paragraph (1) which states, "Everyone has the right to recognition, guarantees, protection, and certainty of fair law and equal treatment before the law". This is what the judge considered so that the judicial review of Article 43 paragraph (1) of Law Number 1 of 1974 concerning Marriage was granted. The rights of illegitimate children, based on Constitutional Court Decision No. 46/PUU-VIII/2010, are granted if it is scientifically proven that the child has a civil relationship with the father and his father's family. This Constitutional Court decision, after scientific proof, means that other heirs

cannot deny the existence of the illegitimate child, because scientifically, the illegitimate child is the child of the testator.

2. The legal consequences of the inheritance rights of illegitimate children following Constitutional Court Decision No. 46/PUU-VIII/2010 are that the biological father recognizes the illegitimate child if they are proven to have a blood relationship, as evidenced by science or other technology, such as DNA testing. This creates a civil relationship with the biological father and his father's family, one of which concerns inheritance rights. Therefore, following Constitutional Court Decision No. 46/PUU-VIII/2010, the illegitimate child is entitled to inherit property from their biological father. Therefore, Constitutional Court Decision Number 46/PUU-VIII/2010 clarifies the position of children born outside of marriage in obtaining legal certainty regarding the inheritance rights of children born outside of marriage.

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